

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**PAPA'S PENN INC. d/b/a
PAPA JOHN'S**

and

Case 29-CA-169864

FAST FOOD WORKERS COMMITTEE

Kimberly A. Walters Esq.,
for the General Counsel.
Jean Morace, President of the
Respondent.
Ceildih B. Gao Esq., counsel for the
the Charging Party.

Decision

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York, on July 7, 8, and 11, 2016. The charge was filed on February 17, 2016, and the complaint was issued on May 20, 2016. In substance, the complaint alleged that on or about February 12, 2016, the Respondent discharged Jesse Scott because he supported the Union and engaged in concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Charging Party is a community organization that is involved in a variety of social issues. It is not clear to me that it actually exists for the purpose, in whole or in part, of representing employees in collective bargaining. Nevertheless, its status as a labor organization is not really critical to this case.

II. The Alleged Unfair Labor Practice

The Respondent's owner is Jean Morace. He is a franchisee of Papa John's Pizza and he operates one store in Brooklyn, New York. His store manager is Juan Otero and as he has the power to hire and fire, I find that he is a supervisor within the meaning of Section 2(11) of the Act. The store employs about 8 or 9 drivers and two individuals who make the pizzas.

Jesse Scott was employed at this store on two occasions. On the first occasion he was discharged in 2013. He was rehired in November 2014 as a driver. In this capacity he worked

Fridays, Saturdays, and Sundays, either from 6 p.m. to midnight or to 1 a.m. Basically, his job was to deliver takeout orders, collect the money, and then turn it in at the end of his shift. Morace's opinion was that Scott was a reliable employee, but one who had a temper and who had difficulty getting along with others. Scott acknowledged that he was not very popular.

Lisa Delancey is an organizer, who is employed by the New York Committee for Change, (NYCC). This is a not for profit community organization. She testified that the Charging Party, the Fast Food Workers Committee is an organization that is allied with the NYCC and that it is engaged in a variety of actions to promote fair pay for fast food workers. She described her role as going to different fast food stores in order to speak to workers and inquire about any issues that they might have. She also testified that in 2015, she became involved in a "wage war" designed to get all fast food workers in New York, \$15 per hour. She testified that this involved holding demonstrations at various restaurants throughout New York State. Jesse Scott testified that he and two other employees of the Respondent attended a number of these demonstrations. But none of those demonstrations were at the Respondent.

There is no evidence that either the NYCC or the Fast Food Workers Committee has ever actually represented employees for the purpose of collective bargaining as that phrase is used in the Act.¹

Scott testified that in the summer of 2015, Delancey visited the store, usually around 5 p.m. on Fridays and spoke to employees about various issues. Whatever discussion were had, they apparently did not involve soliciting employees to authorize the Fast Food Workers Committee to represent them in collective bargaining.

On December 31, 2015, an increase in New York's minimum wage law became effective. But on January 8, the first Friday after the law went into effect, the Respondent hadn't yet changed its payroll to reflect the increase. So on that day, which is the normal payday for the employees, Delancey visited the store and started arguing with the store manager about the employees' pay being incorrect. Morace was notified of this by phone and he came down to the store and spoke with Delancey. Her testimony was that Morace claimed that he was in compliance with the law and that she was wrong. Delancey testified that she insisted that Morace was incorrect and that he said he would check it out later. His testimony was that she insisted that he was not paying the correct amount and that she threatened to shut down the store. Morace testified that this batch of checks did not reflect the change because his payroll company hadn't made the change yet. He testified that he told Delancey that on Monday, the employees would be made whole for any difference in pay, but that Delaney still kept arguing. In fact, the employees were paid the difference.

Although there are minor differences in this account, the two versions are essentially the same. By the way, Delancey admits that she threatened to shut down the store. In either version, Jesse Scott played no role other than being one of the people who got paychecks with the wrong amounts and observed the altercation between Delaney and Morace.

At the end of January, 2016, Scott was accused by store manager Otero of stealing a soda. After contacting Delancey, they visited the store on the following day and confronted

¹ To the extent that this organization purports to act on behalf of employees, if it is not a labor organization then it would not be subject to the Sec. 8(b) provisions of the Act. On the other hand, it would also not be afforded the protections given to labor organizations under the Norris-LaGuardia Act or the exemptions in the Antitrust laws.

Otero about the accusation. After some discussion, Morace came in and Delancey asked why Scott had been taken off the schedule. Morace essentially refused to respond and asked her to leave the premises. She refused. After some more give and take, Morace called the police and after getting both sides of the story, they told Delancey that she had to leave. Delancey agrees that the police mentioned the word trespass.

After this transaction, Scott resumed working on his normal schedule. Morace testified that he didn't do anything about the "stolen soda" as he felt the whole matter was too trivial to warrant any kind of discipline.

On Friday, February 12, 2016, the paychecks were brought to the store and Scott discovered that his check was missing. This apparently was not the only time that this had happened to other employees. And in this respect, the payroll company had notified Morace that when this does happen, he should first contact them before paying cash so that they can investigate and if necessary, stop payment on the missing check.

In any event, when the shift ended at around 1 a.m., Scott insisted that Otero pay him in cash and he refused to leave or turn in the day's receipts until he was paid. Otero said he could not do that without Morace's permission and Scott still insisted on being paid. By both accounts, Scott and Otero got into a loud argument. Otero then contacted the police and they arrived. After some discussion, in which Scott still refused to leave or turn in his receipts, Otero contacted Morace at home and was told to pay Scott in cash and to tell him not to return to work. At this point, Otero gave Scott his wages in cash. Scott then turned over the receipts and Otero told him that he was fired.

During the following week, Delancey led a silent demonstration that took place on the premises of the store. This lasted for a short time.

About a week later, Scott visited the store and spoke to Otero. He asked for his job back and states that Otero told him that he had been given several chances in the past and that he would not rehire Scott because he had brought Delancey into the store.

III. Analysis

The complaint alleges that the Respondent discharged Scott on February 12, 2016, because of his union and concerted activities.

Firstly, I doubt that the charging party can be defined as a labor organization. And even if it could be, there is no evidence that it sought to organize the Respondent's employees for the purpose of collective bargaining. Neither Scott, nor any other employees, were ever asked to sign any kind of form authorizing the charging party to represent them or to bargain on their behalf. I simply do not think that Scott was involved in union activity; albeit it might be argued that he was engaged in concerted activity as defined by Section 7 of the Act.

In my opinion, the only plausible concerted activity, vis a vis, this employer was the time that Scott and other employees were present when Delancey got into an argument with Morace about the increase in the minimum wage law. And in this regard, I don't see Scott as being particularly involved beyond being present. Moreover, this was basically much ado about nothing inasmuch as the company promptly complied with the minimum wage law and almost immediately paid its employees the difference.

5 The incident involving the alleged stolen soda was not concerted activity because Scott's protest, with the assistance of Delancey, was only about himself. Moreover, the employer essentially disregarded this incident and from what I can see, it had nothing to do with Scott's discharge.

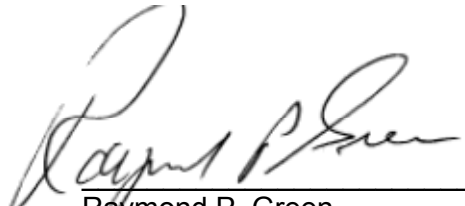
To the extent that Scott may have participated in demonstrations at other companies in New York State, this had nothing to do with the Respondent and I can't imagine that this could have been a reason for his discharge.

10 In my opinion, the only reason for Scott's discharge was the argument that he had with Otero when his paycheck was missing on February 12, 2016. As noted above, when his paycheck wasn't there, Scott understandably was annoyed. Scott then refused to turn over the receipts he received that evening and he refused to leave the premises until he was paid in cash. The testimony of both Otero and Scott shows that this was a heated argument that took
15 place at one in the morning and that the police were called to calm things down. After Otero called Morace, the latter told Otero to pay him in cash. At this point, Otero paid Scott and told him that he couldn't return to work.

20 The General Counsel and the Charging Party argue that the true reason for Scott's discharge was revealed about a week later when he asked Otero to rehire him. Nevertheless, Otero credibly denied Scott's version of this conversation.² And in my opinion, it is totally implausible, given the events on February 12, that the company would have decided to discharge Scott because of his involvement with the charging party or because he happened to witness an argument about minimum wages back in December of 2015.

25 I therefore shall recommend that the complaint be dismissed.

30 Dated at Washington, D.C. August 18, 2016


Raymond P. Green
Administrative Law Judge

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² Even if Otero did say that he was refusing to rehire Scott because Scott brought Delancey into the store, this would have referred to the demonstration that she led in the store's premises during the week after Scott had been discharged. It therefore cannot be asserted that this event had anything to do with Scott's discharge.